



Signed: November 21, 2006

*Leslie Tchaikovsky*

LESLIE TCHAIKOVSKY  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re

No. 05-44325 TM  
Chapter 7

ABDULLAH QARI, aka MICHAEL QARI,  
fdbA ARIANA LIMOUSINE SERVICES,  
and RAHELA JALAL QARI, aka  
RAHELA JALAL,

Debtors

PATELCO CREDIT UNION

A.P. No: 05-4465 AT

Plaintiff,

vs.

ABDULLAH QARI, aka MICHAEL QARI,  
fdbA ARIANA LIMOUSINE SERVICES,  
and RAHELA JALAL QARI, aka  
RAHELA JALAL; and PAUL MANSDORF,  
CHAPTER 7 TRUSTEE

Defendants.

**MEMORANDUM OF DECISION**

In the above-captioned proceeding, plaintiff Patelco Credit Union ("Patelco") seeks to except from the above-captioned debtor's (the "Debtor") chapter 7 discharge pursuant to 11 U.S.C. §

2 523(a)(2)(A) and (6) the debt arising from two vehicle loans (the  
3 "Debt"). The proceeding was tried to the Court on October 11, 2006  
4 and was taken under submission. After considering the evidence  
5 presented and the arguments made at trial, the Court finds and  
6 concludes that Patelco is entitled to a judgment of  
7 nondischargeability as to the Debt. The basis for the Court's  
8 decision is set forth below.<sup>1</sup>

### 9 BACKGROUND

10  
11 At all times relevant to this proceeding, the Debtor was and  
12 still is an automobile salesman. He has over eighteen years of  
13 experience in the automobile sales industry. He has held positions  
14 at most levels of management, including sales manager, finance  
15 manager, and director of operations.

16 In November 2001, the Debtor was employed by Hayward Motors,  
17 Hayward, California, as sales manager. He was also at times  
18 responsible for overseeing the finance department. The owner of  
19 Hayward Motors was and is a long time friend and business associate  
20 of the Debtor's.

21 In November 2001, the Debtor obtained a loan from Patelco to  
22 enable him to purchase a Mercedes Benz vehicle (the "Mercedes")  
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24  
25 <sup>1</sup>The complaint also names the Debtor's wife and co-debtor,  
26 Rahela Qari, and Paul Mansdorf, the chapter 7 trustee, as  
defendants. Mrs. Qari co-signed the notes evidencing the  
Debt. No evidence was presented at trial to support a  
nondischargeable judgment against Mrs. Qari or Mansdorf.  
Therefore, judgment will be entered in their favor.

2 from Hayward Motors, ostensibly for his personal use. In fact, the  
3 Debtor purchased the Mercedes to use in his limousine business.  
4 However, he did not disclose this fact to Patelco. At the time he  
5 purchased the Mercedes, the Debtor knew that Patelco did not make  
6 business loans.

7         The loan agreement required the Debtor to give Patelco a  
8 security interest in the Mercedes by placing its name on the  
9 certificate of title. The check issued to fund the loan contained  
10 a restrictive endorsement, requiring the Debtor to cause Patelco's  
11 name to be placed on title. The check was cashed, but Patelco's  
12 name was not placed on title to the Mercedes. A few months after  
13 the loan transaction, Patelco called the Debtor and complained that  
14 it had not received evidence that it had been placed on title. The  
15 Debtor still did not cause Patelco to be placed on title.

16         After driving the Mercedes for several weeks, the Debtor  
17 purportedly consigned the Mercedes to Hayward Motors for resale.  
18 The Mercedes was sold in April 2002. The proceeds were not paid to  
19 Patelco. However, the Debtor continued to make the monthly loan  
20 payments for a period of time thereafter. In July 2002, while the  
21 Debtor was still current on the loan payments, the Debtor applied  
22 for and received a second vehicle loan from Patelco, this time for  
23 a Ford Mustang (the "Mustang"). Again, the Debtor agreed to place  
24 Patelco on title as the secured creditor. Again, a check was  
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2 issued with a restrictive endorsement, requiring Patelco to be  
3 placed on title. Again, the Debtor failed to cause Patelco to be  
4 placed on title. Again, the Debtor testified that he consigned the  
5 Mustang to Hayward Motors;<sup>2</sup> the Mustang was sold to a third party;  
6 and the proceeds were not paid to Patelco. At that time, the  
7 Debtor stopped making payments on both of the vehicle loans, and  
8 Patelco learned that both vehicles had been sold.

9  
10 In January 2003, Patelco filed suit against the Debtor in  
11 state court, asserting claims for breach of contract and fraud,  
12 among other things. In January 2004, the state court granted  
13 Patelco's motion for summary judgment in that action on all the  
14 claims except the claims for fraud and civil conspiracy. Those  
15 claims were dismissed without prejudice. A money judgment was  
16 entered against the Debtor and his wife for \$79,302.20, plus  
17 attorney's fees.

18 In August 2005, the Debtor filed a chapter 7 bankruptcy  
19 petition. Patelco filed this nondischargeability action in  
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21 <sup>2</sup>The Court is not persuaded that the Mercedes and Mustang were  
22 truly "consigned" to Hayward Motors. Qari testified that he  
23 had entered into a written consignment agreement with Hayward  
24 Motors. However, he failed to introduce into evidence either  
25 the original agreement or a copy of it. Patelco called an  
26 expert witness who testified that the documents evidencing the  
resale of the Mercedes did not reflect industry practice for  
consignment sales: i.e., if the sale had been a consignment,  
the Debtor should have been listed as the seller, not Hayward  
Motors. In fact, according to the vehicle records for the  
Mercedes, the Debtor was never the registered owner of the  
Mercedes.

2 November 2005, asserting a right to a nondischargeable judgment  
3 under 11 U.S.C. § 523(a)(2)(A) and (6). Patelco moved for summary  
4 judgment in April 2006, based on the state court judgment. Because  
5 the state court judgment did not rule on the fraud claim and  
6 instead dismissed it without prejudice, the Court denied the  
7 motion, concluding that an evidentiary hearing was required.

## 8 DISCUSSION

### 9 A. APPLICABLE LAW

10 Section 523(a)(2)(A) provides, in pertinent part, that a  
11 chapter 7 discharge does not discharge an individual's debt:  
12

13 [F]or money...to the extent obtained, by-  
14 (A) false pretenses, a false  
15 representation, or actual fraud, other than a  
statement respecting the debtor's or an  
insider's financial condition;

16 11 U.S.C. § 523(a)(2)(A). To establish "actual fraud," a creditor  
17 must prove five elements: (1) that the debtor made a false  
18 representation, (2) that the debtor knew the declaration to be  
19 false at the time that he made it, (3) that he made the false  
20 representation with the intention of deceiving the creditor; (4)  
21 that the creditor relied on the false representation; and (5) that  
22 the creditor was damaged as a proximate result of having relied on  
23 the false representation. See In re Eashai, 87 F.3d 1082, 1086  
24 (9<sup>th</sup> Cir. 1996). These elements must be proved by the  
25 preponderance of the evidence. Id. at 1087. "[A] false  
26

2 representation may be established by an omission when there is a  
3 duty to disclose." Eashai, at 1089. As stated in Eashai, provided  
4 the debtor has a duty to disclose, "[o]ne who fails to disclose to  
5 another a fact that he knows may justifiably induce the other to  
6 act or refrain from acting in a business transaction is subject to  
7 the same liability to the other as though he had represented the  
8 nonexistence of the matter that he has failed to disclose...." Id.

9  
10 Section 523(a)(6) provides, in pertinent part, that a chapter  
11 7 discharge does not discharge an individual's debt:

12 [F]or willful and malicious injury by the  
13 debtor to another entity or to the property of  
another entity.

14 11 U.S.C. § 523(a)(2)(A). In Kawaauhau v. Geiger, 523 U.S. 57, 61  
15 (1998), the Supreme Court held that, because the word "willful"  
16 modifies the word "injury," a debt is not excepted from a debtor's  
17 chapter 7 discharge pursuant to 11 U.S.C. § 523(a)(6) unless the  
18 debtor intended to injure the creditor. Thus, negligent or  
19 reckless acts do not give rise to a nondischargeable debt pursuant  
20 to § 523(a)(6). Geiger, 523 U.S. 64. The debtor need not have  
21 held any personal animosity against the creditor, but he must have  
22 intended the consequences of his act. Id., at 61-62. In  
23 determining whether a debt is for a willful injury, the Court must  
24 determine whether the debtor subjectively intended to harm the  
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2 debtor or had a subjective belief that harm was substantially  
3 certain. See In re Su, 290 F.3d 1140, 1143-44 (9<sup>th</sup> Cir. 2002).

4 The element of maliciousness must be determined separately  
5 from willfulness. Su, 290 F.3d at 1146; In re Sicroff, 401 F.3d  
6 1101, 1105 (9<sup>th</sup> Cir. 2005).

7 A 'malicious' injury involves '(1) a wrongful  
8 act, (2) done intentionally, (3) which  
9 necessarily causes injury, and (4) is done  
without just cause or excuse.'

10 See In re Jercich, 238 F.3d 1202, 1209 (9<sup>th</sup> Cir.), *cert. denied* 533  
11 U.S. 930 (2001), quoting In re Bammer, 131 F.3d 788, 791 (9<sup>th</sup> Cir.  
12 1997)(en banc). The Ninth Circuit has not yet held definitively  
13 whether these elements are based on a subjective or objective  
14 standard. However, in Bammer, it held that a debtor acted  
15 maliciously and did not have just cause or excuse despite the fact  
16 that he was motivated by compassion for his mother and did not  
17 receive any benefit himself. Bammer, 131 F.3d at 793. It held  
18 that it would be contrary to the spirit of § 523 "to permit a  
19 standardless, unmeasurable, emotional, and nonlegal concept such as  
20 compassion to negate an identifiably and legally wrongful act."  
21 Id. Thus, any subjective claim of just cause and excuse should be  
22 judged narrowly.  
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2     **B. DECISION**

3             **1. Nondischargeability Claim Under 11 U.S.C. § 523(a)(2)(A)**

4             As stated above, a claim of nondischargeability under 11  
5     U.S.C. § 523(a)(2)(A) has five elements: (1) a false  
6     representation, (2) knowledge of falsity, (3) made with the  
7     intention of deceiving the creditor, (4) reliance by the creditor,  
8     and (5) damage proximately caused. As discussed below, at trial,  
9     Patelco established each of these elements by a preponderance of  
10    the evidence.

11            The Debtor's failure to disclose to Patelco that he intended  
12    to use the Mercedes in his limousine business constitutes a false  
13    representation within the meaning of 11 U.S.C. § 523(a)(2)(A).<sup>3</sup>  
14    Given the Debtor's admission that he knew that Patelco did not make  
15    business loans, the Court finds that the Debtor had a duty to  
16    disclose to Patelco that he intended to use the Mercedes for  
17    business purposes. His failure to disclose this information,  
18    knowing its significance, therefore, also satisfies the "knowledge  
19    of falsity" requirement. The Court also finds and concludes that  
20    the Debtor failed to disclose this information, intending to  
21    deceive Patelco. The Debtor wanted to obtain the loans and knew  
22    

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25    <sup>3</sup>No evidence was presented that the Debtor intended to use the  
26    Mustang for business purposes. Given the apparent success of  
   the scheme with respect to the Mercedes, the Debtor may have  
   simply purchased the Mustang for resale as a means of  
   generating cash.



2 Patelco would not give him the loan if he disclosed his intended  
3 use of the Mercedes.

4 Patelco clearly relied on the Debtor's failure to disclose his  
5 intended use of the Mercedes by making the first loan. It was  
6 justified in doing so given the Debtor's failure to disclose his  
7 intended use of the vehicle. There were no "red flags" at that  
8 point that should have raised Patelco's suspicions, thereby  
9 requiring it to conduct a more thorough inquiry of the debtor's  
10 intended use of the Mercedes. See In re Hashemi, 104 F.3d 1122,  
11 1126 (9<sup>th</sup> Cir. 1997)(no duty to investigate in absence of "red  
12 flags"). Patelco's damages, in the amount of the unpaid loan and  
13 related costs, were also clearly proximately caused by the failure  
14 to disclose and Patelco's reliance on it.  
15

16 The Court was not persuaded by a preponderance of the evidence  
17 that, at the time he purchased the Mercedes, the Debtor intended to  
18 resell it without recording Patelco's name as secured creditor on  
19 the certificate of title and without repaying Patelco's loan. This  
20 may have been a scheme developed later. However, the Court was  
21 persuaded by a preponderance of the evidence that, by the time he  
22 purchased the Mustang, this was precisely the Debtor's intention.  
23 Thus, the Court concludes that, when the Debtor obtained the second  
24 vehicle loan, he falsely represented to Patelco that he intended to  
25 repay the loan, that he knew this representation was false, and  
26

2 that this false representation was intended to deceive Patelco.  
3 Patelco's damages are established by the state court judgment.

4 The most difficult element to evaluate is the justifiable  
5 reliance element with respect to the loan for the Mustang. Patelco  
6 knew at the time it made this loan that the Debtor had failed to  
7 record its name on the certificate of title for the Mercedes. It  
8 was clearly negligent in making another loan to the Debtor given  
9 this failure. Under these circumstances, can it be said that  
10 Patelco justifiably relied on the Debtor's promise to repay the  
11 loan for the Mustang?  
12

13 The Court concludes that it can. Justifiable reliance is  
14 judged by a subjective standard. See Field v. Mans, 516 U.S. 59,  
15 67 (1995). Thus, reliance may be justifiable, even if not  
16 reasonable, from an objective standpoint. See In re Tallant, 218  
17 B.R. 58, 68 (Bankr. 9<sup>th</sup> Cir. 1998). The fact that a creditor is  
18 negligent in ensuring that the formalities of the transaction are  
19 followed cannot give a debtor the license to defraud the creditor.  
20 See Eashai, 87 F.3d at 1090-91; Tallant, 218 B.R. at 67.

21 As noted above, the Debtor was continuing to make payments on  
22 the Mercedes loan at the time he purchased the Mustang. Therefore,  
23 although, given the problems with title to the Mercedes, Patelco's  
24 reliance on the Debtor's promise to repay the Mustang loan was  
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2 perhaps not reasonable, the Court finds and concludes that it was  
3 justifiable.

4 The Debtor denied having a fraudulent intent. He testified  
5 that he never received any of the proceeds from the resale of the  
6 vehicles and thus had no intent to deceive Patelco. The Court did  
7 not believe him. His testimony was impeached by the deposition  
8 testimony of Khalil Asefi ("Asefi"), the owner of Hayward Motors.  
9 Asefi testified that the Debtor used the proceeds to pay the  
10 monthly loan payments to Patelco on the Mercedes loan. The Court  
11 found the Debtor's testimony that he continued to make the loan  
12 payments from his own income after the Mercedes was sold lacking in  
13 credibility.<sup>4</sup>  
14

15 The Debtor also testified that it was not his fault that  
16 Patelco's name was not recorded as the secured creditor on the  
17 certificates of title for the two vehicles. He testified that  
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19 <sup>4</sup>The Debtor's testimony was lacking in credibility in other  
20 respects as well. His testimony concerning his reasons for  
21 consigning the vehicles made no sense. He testified that he  
22 consigned the vehicles to Hayward Motors because his limousine  
23 business was failing. However, as noted above, the Debtor  
24 testified that he consigned the Mercedes a few weeks after he  
25 obtained it--i.e., in early January 2003. He testified that  
26 his business failed because his driver loaned one of his other  
vehicles--i.e. a Lincoln--to a friend, the friend received a  
traffic citation, and the Lincoln was impounded. Based on the  
traffic citation, a copy of which was introduced into  
evidence, this did not occur until May 2003, after the  
Mercedes was sold. Similarly, the failure of the business as  
a result of the citation could not have motivated the  
consignment of the Mustang which was not even purchased until  
July 2003.

2 after he consigned the vehicles, he had no ability to cause this to  
3 be done. The vehicles were under the control of Hayward Motors.

4 The Court was not persuaded by this testimony either. As  
5 sales manager, with responsibility for overseeing the finance  
6 department, the Debtor clearly had access to the documents required  
7 to correct this omission. Moreover, if, as he claims, he merely  
8 consigned the vehicles to Hayward Motors before their resale, the  
9 Debtor was still the owner of the vehicles and had an absolute  
10 right to have Patelco's name listed as the secured creditor on the  
11 certificate of title.  
12

13 In sum, the Court finds and concludes that Patelco has met its  
14 burden of proof with respect to all five elements of its claim  
15 under 11 U.S.C. § 523(a)(2)(A) and is entitled to a judgment  
16 declaring the debt created by the state court judgment  
17 nondischargeable.

18 **2. Claim of Nondischargeability Under 11 U.S.C. § 523(a)(6)**

19 As noted above, Section 523(a)(6) of the Bankruptcy Code  
20 excepts from the discharge a debtor for "willful and malicious  
21 injury." This exception applies to property damage as well as  
22 personal injury. See 11 U.S.C. § 523(a)(6). There is no dispute  
23 that, in this case, the Debtor's actions caused Patelco's "injury":  
24 i.e., its failure to receive repayment of the vehicle loans. The  
25 only issues are whether his actions were "willful" and "malicious."  
26

2 As set forth above, these elements must be addressed separately.

3 **a. Willfulness**

4 As discussed above, a two-pronged test is used to evaluate  
5 willfulness. Sicroff, 401 F.3d at 1106, citing Su, 290 F.3d at  
6 1140. The test is subjective. Su, 290 F.3d at 1143-46. The court  
7 must determine that: (1) the act that resulted in the creditor's  
8 injury was intentional and (2) the debtor actually intended the  
9 injury to occur or, at least, was substantially certain that it  
10 would occur. Id.

11 Patelco met its burden of proof as to each of these prongs.  
12 The acts that resulted in the creditor's injury were clearly  
13 intentional regardless of how those acts are defined. In one  
14 sense, the acts that resulted in the injury may be defined simply  
15 as the loan transactions themselves. If Patelco had not made the  
16 loans, Patelco would not have suffered the injury of not being  
17 repaid. The Debtor sought out the loans intentionally.

18 However, the acts that resulted in the injury might also be  
19 described more narrowly: e.g., as the failure to cause Patelco's  
20 name to be placed on the certificates of title for the vehicles.  
21 The Court finds that these acts (or, rather, omissions) were also  
22 intentional. Even if the Debtor initially failed to record  
23 Patelco's name on the certificate of title for the Mercedes through  
24 negligence, he could have corrected the problem when Patelco called  
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2 it to his attention a few months later. Had the Debtor corrected  
3 it, the Mercedes could not have been sold without paying the  
4 proceeds to Patelco. Similarly, given this sequence of events, it  
5 is impossible to view his failure to record Patelco's name on the  
6 certificate of title for the Mustang as anything but intentional.

7 The evidence presented also persuaded the Court that the  
8 Debtor intended Patelco's injury. The Debtor was an experienced  
9 car salesman. He had a managerial position with occasional  
10 responsibility for oversight of the finance department. He knew  
11 what the consequences would be in the event of a resale of the  
12 vehicles of the failure to place a secured creditor on title. If  
13 he did not actually intend to harm Patelco, he was substantially  
14 certain that that harm would occur. Thus, the element of  
15 "willfulness" has been established.  
16

17 **b. Malice**

18 As discussed above, the "malice" test contains four elements.  
19 The creditor must prove the act was: (1) wrongful, (2) intentional,  
20 (3) necessarily caused injury, and (4) was done without just cause  
21 or excuse. Sicroff, 401 F.3d at 1106, citing In re Jerich, 238  
22 F.3d 1202, 1209 (9th Cir. 2001). All four element of this test are  
23 easily established by the evidence presented. Clearly, the failure  
24 to record Patelco's name on the certificate of title was wrongful.  
25 It constituted a breach of the loan agreement and a violation of  
26

2 the restrictive endorsement on the checks funding the loans. As  
3 discussed above, the Court was persuaded by the evidence that the  
4 Debtor intentionally failed to record Patelco's name on the  
5 certificates of title.

6 These actions necessarily caused Patelco's injury. Although  
7 the Debtor could have repaid the loans even though Patelco's name  
8 was not placed on the certificates of title, as a result of the  
9 Debtor's failure to act as legally required, Patelco had no  
10 assurance that the loan would be repaid. And, of course, Patelco  
11 was not repaid. Patelco also lost its ability to repossess the  
12 vehicles and thus recoup some of its losses by selling them.

13 Finally, the Debtor has presented insufficient evidence of any  
14 just cause or excuse for his failure to cause Patelco's name to be  
15 placed on the certificates of title. His attempt to blame Hayward  
16 Motors for the failure was unpersuasive. Even if, as the evidence  
17 suggests is possible, the Debtor was never on title to the  
18 vehicles, his position at Hayward Motors made it possible for him  
19 to correct the problem. Moreover, the fact that the failure was  
20 repeated with respect to the Mustang renders his attempted excuses  
21 totally lacking in credibility.  
22

### 23 CONCLUSION

24 Patelco is entitled to a judgment of nondischargability as to  
25 its state court judgment pursuant to both 11 U.S.C. § 523(a)(2)(A)  
26

2 and 11 U.S.C. § 523(a)(6). Counsel for Patelco is directed to  
3 submit a proposed form of judgment in accordance with this  
4 decision.

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